

BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of San Luis Obispo  
(County File No. 026-ACP-SLO-09/10)

Docket. No. 176

**DECISION**

Charles Van Nortwick  
P.O. Box 1494  
Tulare, California 93275

Appellant/

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county-agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Luis Obispo County Agricultural Commissioner (CAC) found that the appellant, Charles Van Nortwick, violated FAC section 12973 for use of a pesticide in conflict with the label. The commissioner imposed a total penalty of \$1,000 for the violation.

Charles Van Nortwick (Appellant) appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

**Standard of Review**

The Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

### **Appellant's Contentions**

The Appellant contends that the Hearing Officer denied Appellant his due process by relying on evidence not presented during the hearing. Appellant contends that the Hearing Officer abused his discretion by ignoring critical exculpatory evidence, and admitted evidence over objection. Appellant contends that the CAC and the Hearing Officer incorrectly interpreted FAC sections 12972 and 12973. Appellant contends that the CAC engaged in selective enforcement and performed an inadequate investigation of the incident.

### **Factual Background**

On June 8, 2009, Appellant, through his employees, Larry Teves and Tony Gonzalez, applied the pesticide Garlon 4 Ultra (Garlon), registration number 62719-527, by backpack sprayers to weeds along the Union Pacific Railroad right-of-way. Triclopyr is the active ingredient in Garlon. The signal word on the Garlon label is "Caution." There is evidence in the record that the tank mixture was two parts Garlon mixed with one part Pro Crop Oil Concentrate.

Part of the application site was adjacent to Fling Traylor's (Traylor) grape vineyard, where the application was made between 2:00 p.m. and 4:00 p.m. On June 10, 2009, Traylor filed a complaint with the CAC's office, related to the wilting and damaged foliage on his grapes believed caused by the Appellant's application on June 8th.

On June 11, 2009, the CAC's investigator, Dale Donaghe, visited the application site and took gradient foliage samples from five points in an easterly direction from the right-of-way across the Traylor vineyard. The California Department of Food and Agriculture's Center for Analytical Chemistry performed analysis on the samples. The test results showed 133.8 parts per million (ppm) of triclopyr in the weed sample obtained on the west side of the railroad right-of-way and a decreasing gradient of triclopyr of 0.71 ppm to 0.11 ppm in the vineyard samples as distance from the railroad right-of-way increased. There is evidence in the record that the symptoms found on Traylor's vineyard was consistent with Garlon damage.

### **Did the Hearing Officer Rely On Evidence Not Presented During The Hearing?**

In his decision, the Hearing Officer wrote, "Since Mr. Donaghe and Mr. Teves testimony regarding orientation on the two exhibits [County Exhibit 24, and Appellant's Exhibit A, Attachment 1] did not match, and since it is apparent that RESPONDENT Exhibit A, Attachment 1 was produced from the Google Earth Internet program, independent analysis using Google Earth was made by the hearing officer. Conclusion was made that the Union Pacific Railroad tracks in the vicinity of the Traylor vineyard are aligned at 336° (approximately from the SSE to NNW) placing the Traylor vineyard to the ENE of the tracks."

While both the Appellant and the CAC introduced aerial views of the site, it was the Appellant that introduced the Google Earth aerial view of the Traylor vineyard and the railroad right-of-way. Since the parties' testimony conflicted regarding the compass orientation of the site, the Hearing Officer visited the identical Internet Web site used by the Appellant to generate the aerial view and find the orientation. The evidence relied upon by the Hearing Officer was only the exact compass orientation. The Google Earth view is an aerial photograph. Generally, during a hearing, photographs have to be authenticated by the entering party. In this case, the aerial photograph from Google Earth was introduced without objection and without restriction or limitation as to its use; hence, the aerial photograph was evidence for all purposes, and was probative and substantive evidence of what it depicted -- the orientation of Traylor's vineyard in relationship to the railroad right-of-way. To find out a compass heading to clarify a conflict in testimony, in and of itself, did not prejudice the Appellant. The Hearing Officer created a table of the wind direction and the vineyard's offset from 90 degrees right-angle to the right-of-way. Was the Hearing Officer's creation of the table, by using the Google Earth map's compass orientation, a denial of due process to the Appellant? The table is an analysis of the position of the vineyard and the direction of the wind from the treatment site. No new evidence was introduced. The Hearing Officer's review of the Google Earth Internet Web site was within his discretion. The Hearing Officer used the Appellant's evidence to perform his analysis, as Appellant's Exhibit 9 showed wind speed and directions. Therefore, the Appellant's due process was not denied, as only evidence introduced at the hearing was relied upon.

The Hearing Officer went outside of the record by reviewing the seven pages of wind data found from a weather station Web site that was not included in the partial print-out of the document included as part of Exhibit 9 introduced by the Appellant at the hearing. Only the first two pages out of nine were introduced by the Appellant. While the Hearing Officer was wrong to review pages three through nine omitted from Exhibit 9, he is redeemed by the fact that all of the information found on those pages was summarized on page two that was included in Exhibit 9, specifically the page titled, "KCAPASOR3 Weather Graph for 6/8/09." The third and fourth tables on that page labeled Wind Speed and Wind Direction contain the same information as the Hearing Officer's tables. The tables show that between 2:00 p.m. and 4:00 p.m. the wind speeds were between 18 miles per hour to 21.9 miles per hour, and the wind gusts were as high as 29.9 miles per hour. Therefore, while the Hearing Officer's table appears to be from evidence not introduced at the hearing, it contains essentially the same information as found in the partial document that was included in Exhibit 9. Thus, the Hearing Officer's actions were not prejudicial to the Appellant.

With regard to the Hearing Officer's table on page 7 of the CAC's Decision, the data he used was from Exhibit 9, second page, near the bottom of the page. The wind direction and speed, albeit converted to a table format, was present and introduced by the Appellant as Exhibit 9, without objection and without restriction or limitation as to its use. Therefore, the Appellant's due process was not violated.

There is evidence in the record that the Appellant's employee initially told the CAC's inspector that the prevailing winds were blowing west to east, and only later, that same employee altered his initial indication to a north-south wind. Thus, the orientation of the vineyard in relation to the rail road right-of-way and the wind speed and direction are probative.

Did The Hearing Officer Abuse His Discretion By Ignoring Critical Exculpatory Evidence?

The Appellant argues that the Hearing Officer ignored two critical facts; that the Appellant applied the Garlon with low-pressure backpack sprayers and that a 20-foot high railroad berm was a physical barrier that would prevent any material from moving from the treated site. Both of these facts were presented. However, in addition, there is evidence in the record that, on the day of the application, the wind speed was between 8 miles per hour to 21.9 miles per hour and the wind gusts were as high as 29.9 miles per hour between 2:00 p.m. and 4:00 p.m. There is also evidence in the record that the Garlon concentration applied was high -- two parts Garlon to one part oil. Further, Traylor's vineyard tested positive for the active ingredient in Garlon. In reaching his decision, it can be assumed that the Hearing Officer appropriately exercised his discretion to weigh the evidence and to assess witness credibility. There are facts in the record that constitute substantial evidence to support his decision. Although it would have provided a more complete explanation of his decision, the Hearing Officer is not required to list and discuss facts that were less convincing and outweighed by those that establish the violation.

Did The Hearing Officer Admit Evidence Over Objection?

The only piece of evidence found to be introduced over objection was Exhibit 35, portions of the Pesticide Use Enforcement Program Standards Compendium providing guidance on label interpretation. The Appellant's attorney objected by stating surprise and that the CAC had an opportunity to provide him with all of its evidence prior to the hearing. The Appellant was provided with ample time to review the document, given its limited scope; i.e., pages 2-1, 2-2, 2-6, 2-9, and 2-12. All of these pages were fully discussed on the record by both the CAC's advocate and the Appellant's attorney; hence, the objection by counsel of surprise was resolved by the allowance of time to the Appellant's attorney to review the exhibit. Further, the document was not probative to establish any relevant facts, but only on matters of legal interpretation.

Did The County And The Hearing Officer Incorrectly Interpret FAC Sections 12972 And 12973?

Since the CAC did not bring a FAC section 12972 violation, there was nothing to interpret. It was the Appellant that discussed FAC section 12972 during the hearing.

With regard to FAC section 12973, the Garlon label directions states, "*Do not apply Garlon 4 Ultra directly to, or otherwise permit it to come into direct contact with grapes, tobacco, vegetable crops, flowers, or other desirable broadleaf plants and do not permit spray mists containing it to drift onto them.* [Page two of the label.] *Make applications only when there is little or no hazard from spray drift... Do not spray when wind is blowing toward susceptible crops or ornamental plants that are near enough to be injured.* [Page three of the label.] There are advisory statements on the label as follows, "*Small quantities of spray, which may not be visible, may seriously injure susceptible plants.* [Page three of the label.] *Drift potential is lowest between wind speeds of 2 to 10 mph.* [Page four of the label.] *The pesticide should only be applied when the potential for drift to adjacent sensitive areas (e.g., residential areas, bodies of water, known habitat for threatened or endangered species, non-target crops) is minimal (e.g., when wind is blowing away from the sensitive areas).* [Page four of the label.]

The Appellant argued during the hearing that some other application was the actual cause of the damage to Traylor's vineyard, or that the vineyard testing positive for Garlon's active ingredient was a direct result of the volatilizing of the active ingredient triclopyr, which is not a drift. Appellant's expert stated that Garlon's "volatility occurs when the temperature exceeds, starts to become a problem when the temperature exceed about 80 degrees fahrenheit and the higher the temp the more it effects the vapor pressure of the triclopyr." There is evidence in the record introduced by Appellant that showed the prevailing winds in the region as well as the temperatures. The first weather station relied upon by Appellants was located just over five miles from the application and the second weather station was located approximately four miles away. The high temperature recorded at the two weather stations on the days of the application was 77 degrees. The high temperature on the three days after the application was under 80 degrees. The analysis of the vineyard demonstrated a gradient pattern of the active ingredient in Garlon on a susceptible crop. Therefore, the decision correctly found a violation of FAC section 12973, in that the application by the Appellant was made when the potential for drift to adjacent sensitive areas was not minimal; the wind speed was high and the wind direction was, for part of the application, toward Traylor's vineyard; and the active ingredient found in Garlon did come into contact with Traylor's vineyard.

The Appellant contended that the Hearing Officer relied on certain parts of the Garlon label to find a violation of FAC section 12973 which denied him due process. The label in its entirety was introduced without objection; hence, the entire label was subject to scrutiny.

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Finally, the Appellant contended that the CAC's prosecution was discriminatory and that the CAC's investigation was flawed and inadequate. The Appellant speculated that some other person was the cause of the vineyard damage, but failed to introduce any probative evidence to support such speculation. The Appellant argued that during its investigation, the CAC should have tested for the active ingredient in Roundup to determine if a Roundup application was the actual cause of the damage to the vineyard. These issues were discussed and weighed by the Hearing Officer in reaching his decision.

### **Conclusion**

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

### **Disposition**


The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$1,000 fine.

### **Judicial Review**

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION

Dated: 11.01.10

By:   
Mary Ann Warmerdam, Director